Filed 2/17/17 In re R.K. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re R.K., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. R.K., Defendant and Appellant.	E065612 (Super.Ct.No. J264090) OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed as modified.

Sarah Kleven McGann, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Brendon W. Marshall and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

The San Bernardino County District Attorney's Office filed an amended Welfare and Institutions Code section 602 juvenile wardship petition alleging that defendant and appellant R.K. (minor) committed the following offenses: unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count 1), receiving stolen property (Pen. Code, § 496d, subd. (a), count 2), criminal threats (Pen. Code, § 422, count 3), and battery (Pen. Code, § 242, counts 4 & 5). At the outset of the jurisdiction hearing, a juvenile court dismissed counts 3 through 5 pursuant to the People's request. The court then found the allegation in count 1 true and dismissed count 2. At the disposition hearing, the court found that count 1 was a felony, declared minor a ward, and placed him on probation in the custody of his mother.

On appeal, minor contends that (1) the evidence was insufficient to support a true finding of a felony violation of Vehicle Code section 10851, subdivision (a), since the prosecution failed to establish the value of the stolen vehicle, and (2) the probation condition prohibiting him from associating with people using controlled substances is overbroad. The People concede, and we agree, that the probation condition should be modified. Otherwise, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 21, 2015, the victim drove her 2007 Nissan 350Z to work at the Heritage school (the school). She parked right in front of the school, put her car keys in her lunch bag, and left the lunch bag in the break room. At some point during the day, the victim noticed that her car was missing and discovered that her car keys were missing. She reported it to the police.

The victim's car had a LoJack system, which allowed the police to locate the car quickly. Officer Spagon found the car at an apartment complex that was approximately two miles away from the school. Minor and his friend were seen near the parked car, and the officer detained them. After being read his *Miranda*[1] rights, minor told the officer that he and his friend went into a classroom at the school and took the keys belonging to the victim's car. Minor's friend did not know how to drive, so minor drove the car, and they went to his friend's apartment complex. His friend told the officer they took the car to go "joyriding."

At the close of evidence at the jurisdiction hearing, defense counsel argued that there was insufficient evidence to prove an unlawful taking or driving of a vehicle, as alleged in count 1. Counsel argued that, under *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344 (*Ortiz*), the value of the car had to exceed $950 for the offense to be a felony, rather than a misdemeanor, and that no value was

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

shown at the hearing. Thus, he argued that a misdemeanor conviction would be appropriate. The People responded that the manner in which the car was taken was sufficient to make it a felony. The court then took a recess to review *Ortiz*. After reviewing *Ortiz*, the court stated that it was aware of the elements of Vehicle Code section 10851 and concluded that the current offense was appropriately a felony. The court noted that the *Ortiz* court concluded that theft of a vehicle with a value under $950 was a petty theft under Proposition 47; however, the burden of proof was on the defendant to establish the theft item was valued at less than $950. The court stated that the charge in the instant case was for a violation of Vehicle Code section 10851, which required a finding that the defendant took or drove a vehicle without the owner's consent, with the intention of depriving the owner of possession or ownership for a period of time. The court concluded that the People met their burden of proof and found true the allegation as a felony.

ANALYSIS

I. There Was Sufficient Evidence to Support Count 1

Minor argues that the evidence was insufficient to support a finding of unlawful driving or taking of a vehicle as a felony because the prosecution failed to establish the value of the car. He claims that the prosecution made no attempt to establish that the value of the car exceeded $950 in order to qualify as a felony; therefore, this court should find that the theft was a misdemeanor. We conclude that the jurisdictional finding was supported by substantial evidence.

"'When a defendant challenges the sufficiency of the evidence, the test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. [Citations.]'" (*People v. Green* (1995) 34 Cal.App.4th 165, 180.) "'We must make all reasonable inferences to support the findings of the juvenile court and we must review the record in the light most favorable to the juvenile court order. [Citation.]'" (*In re Robert V.* (1982) 132 Cal.App.3d 815, 821.)

"The elements necessary to establish a violation of section 10851 of the Vehicle Code are the defendant's driving or taking of a vehicle belonging to another person, without the owner's consent, and with specific intent to permanently or temporarily deprive the owner of title or possession." (*People v. Windham* (1987) 194 Cal.App.3d 1580, 1590 (*Windham*); see Veh. Code, § 10851.)

Here, Officer Spagon testified that minor admitted that he and his friend took the keys to the victim's car from the classroom, and that he drove the victim's car to his friend's apartment complex. Minor's friend told the officer that they took the car to go "joyriding." The victim testified that when she noticed her car and keys missing, she reported to the police that her car had been stolen. She also testified that she did not know minor, and that she did not give him or his friend permission to take her car or drive it that day. The prosecution established all the elements necessary to show a violation of Vehicle Code section 10851. (*Windham*, *supra*, 194 Cal.App.3d at p. 1590.) We note that, contrary to minor's claim, the prosecution was not required to establish the

value of the car as an element of the crime. Thus, the evidence was sufficient to support a true finding that minor violated Vehicle Code section 10851.

Minor argues that Proposition 47 applies here to reduce his Vehicle Code section 10851 conviction to misdemeanor petty theft under Penal Code section 490.2. As he acknowledges, the California Supreme Court is currently reviewing whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft under Proposition 47.[2] Until the California Supreme Court rules on the question, we will adhere to the view that a felony conviction for violating Vehicle Code section 10851 cannot be reduced to misdemeanor petty theft or qualify for resentencing as misdemeanor petty theft under Proposition 47.

We first note that minor attempts to distinguish his case from the previously published cases that address the effect of Proposition 47 on Vehicle Code section 10851. He asserts that the other appellants filed a petition for resentencing after either pleading guilty to, or being found guilty of, violating Vehicle Code section 10851, prior to the passage of Proposition 47. However, his adjudication hearing took place *after* Proposition 47 established that theft of any property worth $950 or less should be a misdemeanor. He then makes the claim that the passage of Proposition 47 "*added* the value of the stolen vehicle to the prosecutor's burden of proof in order to sustain a felony

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[2] *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250; and *Ortiz*, *supra*, 243 Cal.App.4th 854, review granted March 16, 2016, S232344.

charge." (Italics added.) This claim is unsupported. Proposition 47 provides retrospective relief for defendants who are either serving a sentence or have completed a sentence for a prior conviction, if the prior conviction would have been a misdemeanor under Proposition 47 "had [it] been in effect at the time of the offense." (Pen. Code, § 1170.18, subds. (a) & (f).) In this case, Proposition 47 was in effect at the time of the offense, as minor asserts. In any event, minor is not entitled to relief under Proposition 47. Vehicle Code section 10851 is a "wobbler" offense, punishable either as a felony or a misdemeanor. (Veh. Code, § 10851, subd. (a); see *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974, fn. 4 [listing Vehicle Code section 10851, subdivision (a), as a statute that provides for "alternative felony or misdemeanor punishment"].) The statutory language setting the punishment for violations of Vehicle Code section 10851 remains the same, before and after Proposition 47, and Vehicle Code section 10851 is not included among the enumerated sections amended or added by Proposition 47. (Veh. Code, § 10851, subd. (a); see Pen. Code, § 1170.18, subd. (a).) Thus, minor's violation of Vehicle Code section 10851 is ineligible for designation as a misdemeanor under Proposition 47.

Minor contends that, under the broad language of Penal Code section 490.2, "all low level thefts, regardless of what code section it is charged under, are to be treated as misdemeanors in all cases, except those of individuals with serious criminal backgrounds." We disagree. Proposition 47 added Penal Code section 490.2, which provides: "Notwithstanding Section 487 or any other provision of law defining grand

theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, . . .” (Pen. Code, § 490.2, subd. (a).) Penal Code section 490.2 is listed in Penal Code section 1170.18 as one of “those sections [that] have been amended or added” by Proposition 47. (Pen. Code, § 1170.18, subd. (a).) Penal Code section 490.2 redefines a limited subset of offenses that would formerly have been grand theft to be petty theft. However, “[a] person can violate [Vehicle Code] section 10851[, subdivision] (a) ‘either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).’” (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) In other words, Vehicle Code section 10851 proscribes the action of taking or driving a vehicle “with or without intent to steal.” (Veh. Code, § 10851, subd. (a).) Therefore, depending on circumstances, a violation of Vehicle Code section 10851 may or may not be treated as a “theft conviction” for certain purposes. (*Garza*, at p. 871.) It therefore does not fall within the scope of Penal Code section 490.2. We further note that there was evidence in the instant case that minor and his cohort took the car to go “joyriding.” (See *Garza*, at p. 876.)

Even if we were to assume that Penal Code section 490.2 applied as minor claims, his complaint on appeal still fails. He contends that the juvenile court erroneously placed the burden to establish the value of the stolen vehicle on him. The court was correct. The burden of proof lies with minor to show the facts demonstrating his eligibility for

relief under Proposition 47, including that the value of the stolen vehicle did not exceed $950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 877-879.) Minor did not attempt to meet that burden at the jurisdiction hearing.

In his reply brief, minor again claims that, "[a]fter the passage of Proposition 47, the State bore the burden of proving that the stolen car was valued at more than $950 in order to find [him] guilty of a felony." He relies on *Ortiz, supra,* 243 Cal.App.4th 854 to support his claim. However, *Ortiz* held that the defendant had the burden to establish that the stolen vehicle was valued at $950 or less, in order to show his eligibility for resentencing as a misdemeanor under Proposition 47. (*Ortiz,* at p. 861.) Minor also claims that he is situated differently than other cases on this issue because he "is not seeking resentencing, where the burden might be shifted to the defendant." Contrary to this claim, he then "requests that this Court find that his theft of the car was a misdemeanor under Proposition 47" and "asks that the Court remand for resentencing."

We conclude that the prosecution was not required to establish the value of the car as an element of a violation of Vehicle Code section 10851, and that the evidence was sufficient to support the court's true finding.

II. Probation Condition No. 7 Should Be Modified

Minor challenges probation condition No. 7, which requires him to: "Not knowingly associate with any personally known user or seller of controlled substances nor be in a location known by the probationer to be a place where controlled substances

are used or sold." The People concede, and we agree that this probation condition should be modified.

At the outset, we note that the juvenile court "has wide discretion to select appropriate conditions and may impose '"any reasonable condition that is 'fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' " ' [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) A "condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Id.* at p. 890.)

Minor specifically argues that condition No. 7 is overbroad because it would prohibit him from associating with persons using medically necessary prescriptions or entering a pharmacy or any stores containing a pharmacy. He requests this court modify condition No. 7 to include the concept of the illegality of controlled substances. The People agree.

Condition No. 7 has the apparent purpose of protecting minor from drug abuse and the influence of drug dealers and abusers. However, it includes the term "controlled substances," which is very broad. Controlled substances are defined and listed in Health and Safety Code sections 11054-11058. The lists include not only illegal substances, like heroin and marijuana (Health & Saf. Code, § 11054, subds. (c)(11), (d)(13)), but many commonly prescribed medications. Thus, condition No. 7, as written, may prohibit minor from associating with persons using or selling prescription medication. We ascertain no

rehabilitative purpose in such restriction. "'California Courts have traditionally been wary of using the probation system for any nonrehabilitative purpose, no matter how superficially rational.' [Citation.]" (*People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1444, superseded by statute on other grounds, as stated in *People v. Moret* (2009) 180 Cal.App.4th 839, 853.) We conclude that condition No. 7 should be modified to read as follows: Not knowingly associate with any personally known user or seller of illegal controlled substances nor be in a location known by the probationer to be a place where illegal controlled substances are used or sold.

DISPOSITION

Probation condition No. 7 is modified to read: Not knowingly associate with any personally known user or seller of illegal controlled substances or be in a location known by the probationer to be a place where illegal controlled substances are used or sold.

In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.